MONTANA ENVIRONMENTAL QUALITY COUNCIL

THE ROLE OF THE STATE IN FEDERAL AND INDIAN LAND USE DECISIONS

by

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October 1974

A Study Conducted for the
EQC Land Use Policy Study

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RESEARCH SUPPORTED BY FORD FOUNDATION GRANT NUMBER 730-0141

Table of Contents

I. Introduction 1

II. Historical Backdrop: Prior Indian and Federal Ownership 1

III. The Federal Presence in Montana 4

A. Federal Agencies and Their Holdings 4

B. The Federal Reservation Doctrine 8

IV. Federal Supremacy and the State Position 15

A. Federal Supremacy 15

B. State Police Power 16

C. General Principles of Interaction 16

V. State Alternatives With Respect To The Federal Government 22

A. Federal/State Advisory Boards and Agreements 22

B. Complaint Procedures 23

C. State Participation in Federal Decision-Making 24

D. The Executive Branch of State Government 26

E. Congressionally-enforced Compliance with State Law 27

F. State Regulation of Private Operators and Operations 27

G. A Word on Federal Funding 28

H. Conclusion 28

VI. The Indian Presence 29

A. Indian Lands 29

B. Indian Water Rights 31

VII. Indian Sovereignty and the State Position 35

A. Ordinance I, Section 2 36

B. Public Law 280 39

C. Water Rights 42

D. A Word on Fee Lands 43

VIII. State Alternatives With Respect to the Indian Reservations..... 44

IX. Summary of Findings and Conclusion..... 45

Footnotes

List of Tables

Table I. Approximate Area of Federal Land Dispositions Under the Public Land Laws, Montana..... 3

Table II. Federal Agency Holdings Within Montana..... 5

Table III. Percentages of Federal Ownership Within The Top 15 States..... 6

Table IV. Indian Reservation Acreage..... 30

List of Figures

Figure 1. The Organization of the Forest Service, shown in this chart encompasses varied activities..... 9

THE ROLE OF THE STATE IN FEDERAL AND INDIAN LAND USE DECISIONS

I. Introduction

There are several political and cultural[1] entities within and around Montana making land use decisions which can affect environmental quality in the state. In varying degrees, each is not subject to Montana law. These include: numerous agencies of the federal government, seven Indian reservations, adjacent states[2], and the adjoining provinces of Canada. Although each merits attention, this paper deals only with the federal agencies and with the Indian reservations. Special emphasis is placed on the appropriate alternatives for the state of Montana to influence and/or determine those land use decisions which can affect the environmental quality of the state.

Given recognition of the facts that the law does not stand still and that ecological (and socio-economic) events and processes do not respect political or cultural boundaries[3], each of the above enumerated entities and their interactions need continuing attention.

II. Historical Backdrop: Prior Indian and Federal Ownership

In 1660, the Frenchman LaSalle travelled the Mississippi, poked around, and ignoring the existing inhabitants of the area, declared that all adjacent territory belonged to King Louis XIV; thus the name "Louisiana."[4] Much later, Thomas Jefferson worried that France and Spain could severely impair the economy of the budding nation by controlling United States use of the Mississippi River. Accordingly, he sent James Monroe to join Robert Livingston in Paris and negotiate with Napoleon Bonaparte for the purchase of New Orleans. Napoleon would not sell New Orleans by itself, however. In consequence, Livingston and Monroe, without

specific authorization, agreed to purchase some 520 million acres of land (the boundaries were quite imprecise) for $27,000,000.[5] The treaty ceding this enormous chunk of land to the U. S. was ratified by a somewhat hesitant Congress in 1803.[6] Thus, spurred primarily by the desire to protect marketing routes, the United States government acquired what is now much of the 13 central and northern plains states. In the northwest corner of this vast land area lay the headwaters of the Missouri and most of the present state of Montana, then about to be explored by Lewis and Clark.

Later, in 1846, a long-standing boundary dispute with Great Britain was resolved. The nearly 290,000 square miles acquired by the U. S. included the present states of Washington, Oregon, Idaho, western Wyoming, and the northwest sector of Montana.[7] The remaining portion of what was to become Montana was by that treaty placed in U. S. Government ownership.

Of course, in the national fervor over discovery rights, acquisition, and manifest destiny, few efforts were made to determine the extent of the rights of the previous inhabitants of the area.[8] They were to be dealt with on a more or less ad hoc basis. This ad hoc treatment and its vacillations have resulted in a compelling, if aggravating, series of conflicts between the powers of the states and the somewhat limited but very real sovereignty of the Indian tribes.[9]

By and large the present land ownership pattern in Montana has evolved from two historical situations: massive federal acquisitions of European-claimed Indian lands and subsequent large-scale federal land disposals. In short, the state of Montana has emerged from various federal and Indian holdings. The federal land disposals throughout the 19th and 20th centuries are shown in Table 1.

Over the years, the state of Montana and the federal government have been involved in a variety of land use controversies. But, federal/state battles are not recent phenomena and are certainly not confined to Montana. For example,

TABLE 1.

Approximate Area of Federal Land Dispositions Under the Public Land Laws, Montana.

Types of Disposal	Acres
Cash sales	1,627,000
Homesteads	31,874,000
Mineral entries	265,000
Timber and Stone entries	664,000
Timber culture entries	85,000
Desert land entries	3,051,000
Railroad grants	14,740,000
State grants	5,963,000
Ceded Indian Lands	2,500,000
Other	137,000
TOTAL DISPOSITION	60,906,000

Source: Peters, William S., and Maxine C. Johnson, Public Lands in Montana (Missoula: Bureau of Business and Economic Research, 1959): 13.

in the late 18th century, lands west of the original 13 colonies were claimed by a number of states. The states which did not have western land complained, suggesting that those lands should be owned by all 13 states in common.[10] The resulting feud resembled in many respects the more recent state/federal government land policy disputes in which Montana has figured prominently: ranging from the creation of forest reserves in the late 19th century to federal coal/energy policy and the use of the federal reservation doctrine for water in the mid-20th century.

III. The Federal Presence in Montana

A. Federal Agencies and Their Holdings

As noted above, the federal government at one time claimed ownership to all of the state of Montana; and even after years of extensive federal land disposals, the federal government's presence in Montana remains awesome. Eighteen federal agencies, sometimes with little coordination, directly manage resources on 27,654,289 acres within the state. (See Tables II and III) Cooperative federal/private management occurs on countless additional acres of private land. In addition, the federal government has reserved rights to an as yet undetermined quantity of surface (and perhaps ground) water in the state.

Largest of the federal agency land ownerships in Montana are: the U. S. Forest Service, the Bureau of Land Management, the National Park Service, and the Army Corps of Engineers respectively. However, judging involvement using acreage figures can be deceiving. They do not necessarily correlate directly to severity of impact. Consider, for example, the acreage in Montana controlled by the Atomic Energy Commission or the Bonneville Power Administration (0 and 118 acres respectively). Both agencies, even with minimal land holdings, have

TABLE II.

Federal Agency Holdings Within Montana (acres)

State Area: 93,271,040

Federal Holdings: 27,654,289

1.	U.S. Forest Service	16,669,099
2.	Bureau of Land Management	8,217,414
3.	National Park Service	1,154,766
4.	Corps of Engineers	601,908
5.	Bureau of Sports, Fisheries, & Wildlife	497,370
6.	Bureau of Reclamation	302,546
7.	Bureau of Indian Affairs	125,473
8.	Agricultural Research Service	72,310
9.	U.S. Army	6,660
10.	U.S. Air Force	6,033
11.	Federal Aviation Administration	233
12.	Government Service Administration	155
13.	Veteran's Administration	149
14.	Bonneville Power Administration	118
15.	Dept. of Health, Education, & Welfare	33
16.	Dept. of Justice	22
17.	U.S. Post Office	5
18.	U.S. Treasury Department	5

Source: Public Land Law Review Commission, One Third of the Nation's Land (Washington, D.C., U.S. Government Printing Office, June, 1970)

TABLE III.

Percentages of Federal Ownership Within The Top 15 States

1.	Alaska	95.3
2.	Nevada	86.4
3.	Utah	66.5
4.	Idaho	63.9
5.	Oregon	52.2
6.	Wyoming	48.8
7.	Arizona	44.6
8.	California	44.3
9.	Colorado	36.3
10.	New Mexico	33.9
11.	Montana	29.6
12.	Washington	29.4
13.	District of Columbia	28.4
14.	New Hampshire	12.2
15.	Florida	9.8

Source: Public Land Law Review Commission, One Third of the Nation's Land (Washington, D.C., U.S. Government Printing Office, June, 1970)

plans that could significantly impact the state. AEC has grandiose designs for coal-related experimentation (from reclamation to in situ gasification) and nuclear stimulation of natural gas projects.[11] BPA has transmission lines, weather modification, and other plans in the western part of the state.[12]

An additional factor -- interagency cooperation -- ironically can lend invisibility to federal agency activities and deserves attention. For example, hard rock mining on national forest lands, until recently, has been only scantly controlled by the U. S. Forest Service. The Bureau of Land Management of the Department of Interior regulated mining activities on its own land and on some 300 million acres of land the surface of which was managed by other agencies including the Forest Service. After interminable delays, the Forest Service did propose and has recently adopted mining regulations designed to give it more control over mining on its own lands. However, by then, a third and nearly unreviewable agency was involved. The President's Office of Management and Budget, which like the AEC owns no land in Montana, had the Forest Service regulations in-house for over a year and accomplished significant re-writing before they were released to the public for comment. The public is unable currently to review the Forest Service proposal as it stood before Office of Management and Budget review. The last draft of the regulations was made available and became effective September 1, 1974.[13]

Proclamations of cooperation between federal agencies in the Bighorn/Pryor Mountain complex obscured the depth of genuine interagency planning and discouraged citizen or state involvement in assessing the comprehensive planning accompanying a pending road decision there.[14]

In short, the federal presence in Montana is not merely one of acreage owned. It is an enormous and sometimes incohesive series of plans, institutional arrangements, functions, and decisions. Even with the well-developed techniques used in organizational chart preparation, the complexity of the U. S. Forest Service can be seen in Figure 1.

B. The Federal Reservation Doctrine

In the semi-arid and arid lands of the West, the common law "riparian" (adjacent land) theory of water rights fell into disrepute as a result of the economic development patterns which emerged. Under the riparian theory of water rights, commonly used in the eastern United States, a right was obtained by acquiring land adjoining a body or stream of water. Upon acquiring land, the owner was entitled to the continuous flow of an adjacent stream with either its quality or quantity substantially unimpaired.[15] However, western settlers couldn't all locate immediately adjacent to the relatively scarce surface water of the region. Beyond that, mining and agricultural development involved the diversion of substantial quantities of water for use at sometimes distant places.

Congress recognized this demand for water on non-riparian lands in the Act of July 26, 1866, and the Desert Land Act of 1877.[16] Those statutes allowed the separation of water rights from adjacent land. Western states furthered this split, developing various forms of the "appropriation" doctrine by which water could be diverted and applied to beneficial uses regardless of location.[17] Generally, the first person in time obtained a priority right; and failure to use the water beneficially for a certain period of time could work forfeiture of the appropriation. The appropriation doctrine thus was a "completely utilitarian system" suited to the Western frontier.[18] Apparently, too, the general view at the time was that all water appropriations were governed entirely

ORGANIZATION CHART

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

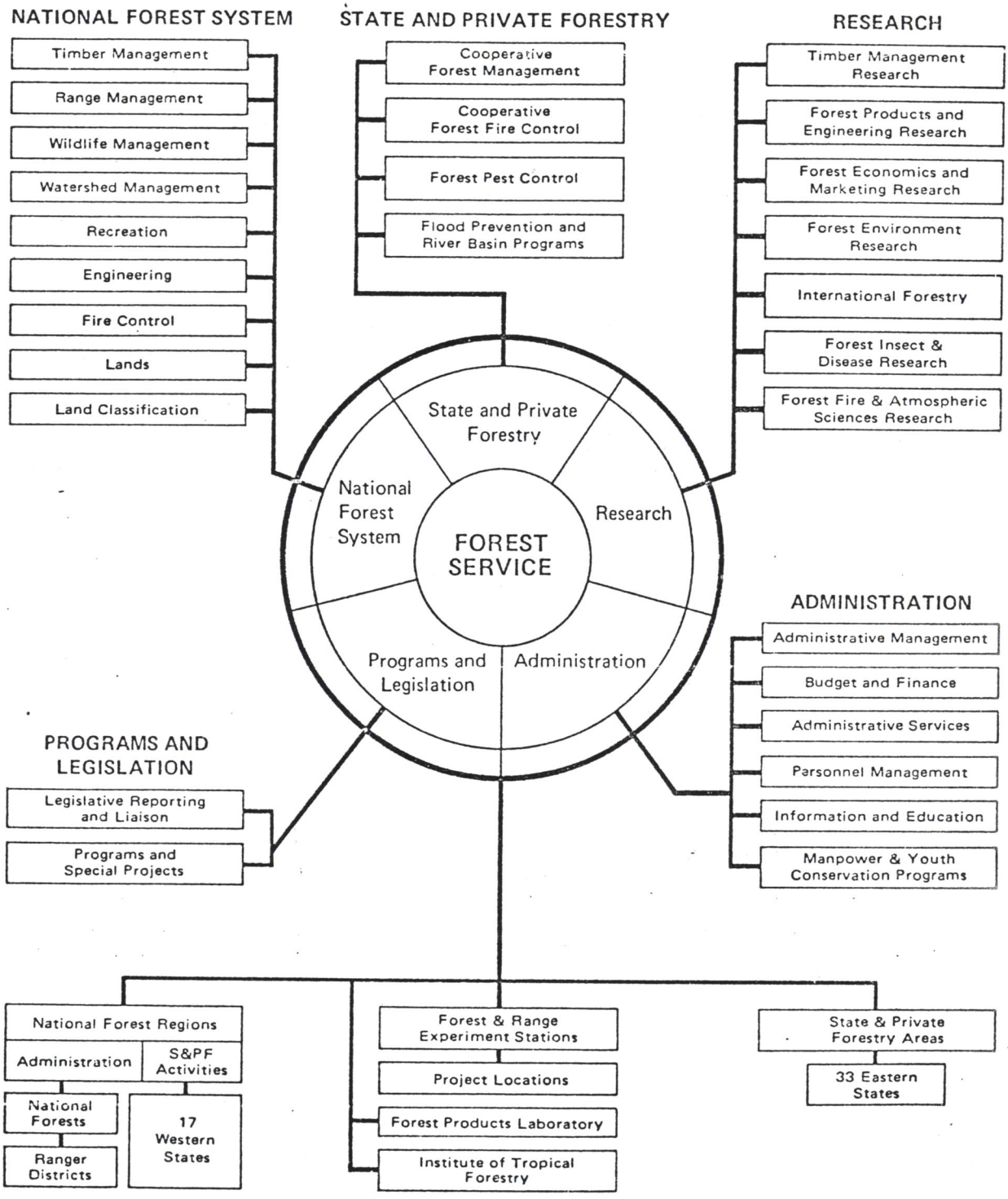

Figure 1. — The organization of the Forest Service, shown in this chart, encompasses varied activities.

Source: Richard M. Alston, Forest - Goals and Decisionmaking in the Forest Service, Research Paper INT-128, USDA, Forest Service, Ogden, Utah, September, 1972.

by state laws. The federal Reclamation Act of 1902 explicitly recognized these state procedures, but only for the purposes of that act:

> "[N]othing in [this act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws..."[19]

In 1899 dictum, the U. S. Supreme Court hinted that something like a reservation doctrine was a possibility:

> "...[I]n the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property."[20]

In 1908, the federal reservation doctrine had its explicit beginnings when the U. S. Supreme Court considered the conflicting water claims of a Montana Indian reservation and upstream diverters of water. The Winters case found that the Indian tribes, when agreeing to treaties, implicitly reserved the water without which their lands would be valueless.[21]

In 1963, the U. S. Supreme Court extended this principle to national recreation areas, national forests, and wildlife refuges. Under the case, Arizona v. California,[22] the federal government is held to possess a water right sufficient to meet the needs of the lands set aside (as a national recreation area, national forest, or wildlife refuge).

Such reserved rights are not subject to the typical state requirements for diversion and/or application to beneficial use. Nor are they subject to abandonment for non-use. The priority date of the reserved right is the date the federal area was created, generally, the late 19th and early 20th centuries. The right is inferior to prior appropriators and superior to all subsequent appropriators; and, under most interpretations, since the assertion of this federal claim is the

exercise of a superior right, compensation provided for takings under the Fifth and Fourteenth Amendments of the U. S. Constitution need not be paid. Additionally, both the Winters doctrine rights of Indian tribes and the broader federal reservation power can be increased to meet the reasonable future needs of the area for which water is reserved.[23] They are not static or easily quantifiable rights.

In 1970, the U. S. Supreme Court was called upon to determine whether federally reserved water rights could be forced into state adjudication proceedings.[24] The Court answered in the affirmative and cited the "McCarran Amendment":

> "Consent is given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights where it appears that the United States [owns] or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise...."[25]

The federal government was arguing that the McCarran Amendment applied only to those water rights the federal government had acquired under state law -- that reserved water rights could not be adjudicated in state court. A unanimous Supreme Court disagreed saying that the language of the amendment "would seem to be all-inclusive."[26] That section applies, the Court said, to water rights previously acquired by the U. S. whether appropriated, riparian, or reserved.

However, the Court clearly specified that priority of water rights, and the volume and scope of rights, "are federal questions which... can be reviewed here (the U. S. Supreme Court) after final judgment by the Colorado court."[27] In a companion case, the Court noted: "as we said in the [Eagle] case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review."[28]

This indicates that the federal government cannot be compelled to quantify with finality its reserved rights at the time a state court adjudicates a watercourse. Even if, as recently held in an Idaho Supreme Court decision,[29] this question is answered in the affirmative, the language of the Eagle case clearly specifies that priority, volume, and scope of federal water rights are matters to be resolved in federal court.[30] The state, if not a named plaintiff or defendant, could no doubt intervene in such a federal review. Specific legislative guidance on this point might be helpful should a conflict arise.

As will be discussed below, it has been decided that Indian reserved water rights probably can be conveyed for use to private parties. The priority date and all other accoutrements of the right might also be conveyed. Whether and how this can be accomplished with respect to all federal reservations is not yet clear.[31] However, if federal water rights can be transferred freely, special use permittees on federal land, such as the proposed Walt Disney development in the Mineral King Valley of California or the proposed Ski Yellowstone development (part of which could be located on Gallatin National Forest lands), may be able to claim a valuable water right for use in their developments. Perhaps more crucial, coal or oil shale reserves may be developable with as yet unmentioned reserved water rights, depending on the terms of the reservation. Since Congress does have jurisdiction over this area, memorializing Congress on the use of reserved rights by private entities may turn out to be a good deal more important than worrying about other direct federal uses of water.[32]

The implementation of the federal reservation doctrine could have a substantial impact on the economic and environmental situation of a state, especially where private appropriators approach or exceed the limits of a watercourse or recharge area. Additionally, serious ecological consequences could occur if, say,

the federal government attempted to apply the reservation doctrine to the development of federal coal reserves.

At the same time, the federal reservations for park, recreation, and forest purposes were created to provide continuing benefits to this and future generations; and, indeed, the forests, recreation areas, and wildlife refuges have benefited the economy of the states in monetary as well as qualitative terms. Nonetheless, the seemingly essential uncertainty of the federal claim causes a good deal of doubt in water rights.[33]

The law review articles of late almost unanimously oppose the federal reservation doctrine.[34] For example, one commentator calls it "a selfish doctrine much too rigid and wasteful to tolerate."[35] Another urges the use of equitable estoppel (a judicial equity doctrine applied when all else fails) to achieve a more just and conscionable result than obtains now under the doctrine.[36]

Claims that the federally reserved waters should be quantified and that appropriators who acted in good faith should be compensated when the federal government asserts a conflicting, overriding claim are common. The Montana legislature could memorialize Congress to this effect. Such a step could follow the recommendation of the Public Land Law Review Commission that compensation be allowed to all valid appropriators of record prior to the Arizona v. California decision in 1963.[37]

However, if this is to be done, several points should be kept in mind.

1. The doctrine is a classic reminder that ecological processes and resource availabilities do not conform to our political boundaries or legal conventions. Efforts to draw hard and fast lines with respect to the water needs of federal reservations, such as a forest or wildlife area, will probably meet with frustration. Accordingly, a mechanism to balance federal and state water claims or a range quantification of the federal claims would appear more fruitful than precise quantification.

2. A good deal of the emerging conflict between federal and private users stems from the all too common assumption that optimum water or other resource use is the same as maximum use. Thus, in water appropriations, there is a continuing kind of ecological brinksmanship or "limit-pressing" that leaves no room for anticipating the risks occasioned by ecosystem intervention or for accommodating competing demands without aiding one party to the detriment of the other.

The utilitarian emphasis of Western water law may itself be responsible for much of the existing federal/state tension. In the long-run, substantial revision of the western appropriation doctrine may be in order notwithstanding the new Montana Water Use Act and should be considered by the legislature.[38] Establishing prior buffer or minimum flow requirements for watercourses is another possibility that should be assessed.

3. If compensation to subsequent good-faith appropriators is to be advocated, consideration should be given to a process insuring that speculative water appropriation is not rewarded from the public treasury. Additionally, given current judicial opinion that the priority, quantity, and timing of federal water rights are matters for federal resolution, encouraging the creation of a federal-level program to disburse compensation to affected areas and/or parties might be a better solution than judicial resolution of each appropriator's conflicting claim.

Whether or not expressions of sentiment by the legislature would help, the reservation doctrine is an important guarantee of the quality of federal lands in the region. At the same time, it could lead to serious and protracted difficulties in a region where water represents one of the clearest limitations on human activity. Early state quantification of present uses and reasonable future needs would lend to Montana water claims an air of authority not now present. The key legislative activity to accomplish this particular task is more adequate funding for the implementation of the 1973 Water Use Act.[39]

IV. Federal Supremacy and the State Position

A. Federal Supremacy

The federal government, acting pursuant to the U. S. Constitution, clearly is the supreme governing body:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."[40]

In McCulloch v. Maryland, U. S. Supreme Court Chief Justice John Marshall interpreted this clause to the effect that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[41] The general principle announced in that old case -- voiding state taxation of notes issued by a branch of the U. S. Bank -- still survives. Where there is conflict between federal law, constitutionally enacted, and state law, the state law is easily superseded.

In another section, the U. S. Constitution appears to announce fairly straightforward federal jurisdiction over public lands: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...."[42] Under this provision, it has been held that Congress, not the courts, decides how the public lands will be administered;[43] that Congress is in effect trustee of the public lands;[44] and that state consent is not necessary, for example, prior to federal withdrawal of public lands from settlement or grazing.[45] If the above provisions were the end of the matter, courts could merely determine whether a state law was incompatible with the policy or provisions of an allegedly conflicting federal law. If so, the state law would fail; if not, it would stand. However, this

is not the end of the matter and, in consequence, the federal/state relationship and the body of legal opinion surrounding federal "pre-emption" is one of the most confused.

B. State Police Power

In general, the states can exercise "police powers" to promote the public health, safety, order, morals, and general welfare of the society. These powers are inherent state governmental powers and include the powers reserved to the states under the Tenth Amendment to the U. S. Constitution. Of course, police powers must be exercised consistent with the requirements of federal and state constitutional provisions--equal protection, due process, etc.[46] The federal government does not have "police powers" and can exercise only those powers expressly granted or implied in the U. S. Constitution.

A rash of proposals has emerged recommending the use of taxes, subsidies, or other incentives to control land use practices.[47] With respect to these proposals, it should be noted that the use of taxes for regulatory, as opposed to revenue, purposes is an exercise of the police power of the state, not its taxing power.[48] This distinction provides some additional lee-way for state influence--as opposed to direct regulation of land use practices.

C. General Principles of Interaction

Several general questions on the state relationship to federal holdings and resources arise:

1. Can the state control federal land use activities dealing with federal resources or occurring on federal lands within the boundaries of the state?

2. Can the state control private land use activities dealing with federal resources or occurring on federal lands within the boundaries of the state?

3. To what extent can the state adopt policies and/or regulations more lenient than federal policies?

4. To what extent can the state adopt policies and/or regulations more stringent than federal policies?

Needless to say, specific answers to the above will always await a patient review of the circumstances of individual cases; however, a few general principles can be stated.

1. State Regulation of Federal Activities

Article IV, Section 3 of the U. S. Constitution makes it clear that, as a rule of thumb, on lands to which the United States holds title federal agencies are not subject to state regulation. Within this area some important conflicts develop however. For example, the states manage wildlife -- game and non-game species. The federal government becomes involved -- apart from funding -- only in the case of migratory or endangered species and with the recognition of wildlife habitat as part of the multiple use management concept. As a matter of course, federal activities on federal lands can have a profound impact on the wildlife management efforts of state government.[49] But, the state apparently does not have power to curb the granting of a timber sale or special use permit whether it seriously affects wildlife or not.

The U. S. Forest Service recently made clear its position with respect to state laws.

> "As a matter of FS policy, the same basic approach is applicable even when there is no Federal law requiring compliance with State laws. The FS will voluntarily meet State substantive standards unless we determine that our responsibilities for management of Federal lands conflict with State requirements. Although we should provide information as requested by State authorities, we will not seek or accept State or local governmental permit approval."[50]

In short, federal activities on federal lands are the province of the federal agency in charge. Absent explicit Congressional mandate to comply with state law, no such compliance is necessary. State protestations to the contrary are hortatory

only. Additionally, state taxation of federal land or instrumentalities prohibited absent specific waiver of immunity by Congress.[51]

2. State Regulation of Private Activities

This one is more complicated. The state of Montana currently regulates private parties on all lands (except reservation lands) within the state under at least three Montana statutes: the Hard Rock Mining Reclamation Act, the Landowner Notification Act (primarily a trespass statute), and the Surface Mining Reclamation Act.[52] However, explicit exceptions are contained in two of the acts. The Landowners Notification Act exempts discovery pits on federal lands[53] and operations pursued under a prospecting permit or lease.[54] The Hard Rock Mining Reclamation Act exempts operations on federal lands if the Board of Land Commissioners finds that the operation will be regulated at least as strictly as Montana law.[55]

As a general rule, the states may prescribe reasonable police power regulations applicable to federal lands provided both of two caveats do not apply: (1) such regulation does not conflict with federal law and (2) Congress has not acted to pre-empt the field. Conflict with applicable federal law is more easily determined than pre-emption.[56]

State jurisdiction cannot extend to the point where it conflicts with the full power of the United States to protect public lands, control their use, and prescribe the manner in which rights to the public lands may be acquired.[57] But, the Tenth Circuit Court, construing the federal Mineral Land Leasing Act, has held that state law and police power extend over public lands "unless and until Congress has determined to deal exclusively with the subject."[58] In general, then, it appears that a state may prescribe reasonable police regulations applicable to federal lands if such regulations do not conflict with federal enactments and if congress has not acted to pre-empt the area.[59]

It has been held by the U. S. Supreme Court that the federal Atomic Energy Act does pre-empt state standards.[60] In the affirmed circuit court opinion, several points were established prior to a pre-emption determination:

1. The Congressional action must be an exercise of a Constitutionally delegated or implied power.

2. The Congressional action must be exercised in such manner as to exclude concurrrent state jurisdiction.

3. The Congressional action must either operate to exclude application of state law or intent must be found to displace state regulation. Pre-emption can be implied. To determine this, courts will look to legislative history, the pervasiveness of the regulatory scheme, the nature of the regulated area, and whether state law acts as an obstacle to the federal purposes and objectives of Congress.[61]

For example, since the Congress has yet to enact federal legislation governing the reclamation of surface mined lands, the federal Mineral Leasing Act remains the primary federal action in this area.[62] That act contains the following 'savings clause':

> "Each lease shall contain... a provision that such rules... for the prevention of undue waste as may be prescribed by [the Secretary of the Interior] shall be observed... and such other provisions as [the Secretary] may deem necessary... for the safeguarding of the public welfare. None of such provisions shall be in conflict with the laws of the State in which the leased property is situated." (emphasis supplied)[63]

It appears that this savings clause manifests a clear Congressional intent not to pre-empt state regulatory activity. In fact, this savings clause was interpreted as a sign that the federal government did not intend to supplant or foreclose state regulation.[64]

As one commentator stated, he is "of the opinion that as to public-domain lands, the state conservation laws will remain applicable so long as they pose no significant threat to any federal policy or interest."[65] The extent of such

regulatory activity should be determined with reference to the other provisions of the Mineral Leasing Act, including the promotional character of the Act's title and the conservationist character of the operative provisions.

In light of the above, it appears that the provisions of the Montana Strip Mining and Reclamation Act of 1973[66] and the Strip Mine Siting Act of 1974[67] can be applied to private operations on federal lands or involving federal resources, unless provisions in the current federal strip mine regulation proposals remove the state prerogatives. As the proposals now stand, they would not do so; in fact, they specifically authorize states to enforce stricter standards.

Mining of claimable minerals presents greater difficulties however. The primary cause of the difficulties is the federal policy, manifest in federal mining laws, to open public lands for mineral activity. Under these federal statutes, those wishing to prospect for or mine locatable minerals have been held to possess a statutory entitlement to do so without unnecessary interference by regulatory agencies. In addition, the recently adopted U. S. Forest Service regulations duplicate some of the requirements of the regulations adopted under the Montana Hard Rock Mining Reclamation Act. Whether the Forest Service regulations will pre-empt the state regulations is unknown at this time. Cooperation with the Forest Service on bonding, reporting, etc. will reduce the likelihood, however.

The state can also levy taxes on private activities on federal land or dealing with federal resources; however, if such tax--whether for revenue or regulatory purposes--operates to impose of burden or constraint on an activity clearly supported by Congress, the tax risks being overridden. In fact, the early supremacy clause case, McCulloch v. Maryland, rested squarely on that issue.[68]

In recent statutes, Congress has shown increased concern with "dynamic federalism" and decentralization of governmental functions and has taken special pains to note the non-pre-emptive nature of Congressional enactments. For example, the 1970 federal Clean Air Act amendments provide:

> "Except as otherwise provided in sections... of this title (pre-empting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation or under section 1857c-6 or section 1857c-7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."[69]

The above section, in typical Congressionalese states in a negative but explicit way that states are free to adopt more stringent standards than the federal government -- subject to the traditional constitutional, statutory, and common law rules of fairness and consistency. It can be expected that pending federal legislation on mining reclamation, utility siting, and land use policy will preserve a similar amount of state action. However, it should be recalled that the Clean Air Act section was interpreted not to require compliance with state level procedures.[70]

Of course, the federal government is free to delegate to state legislatures the authority to make additional regulations governing federal lands.[71] The probability that this power will be exercised is doubtful however.

3. More Lenient State Regulations

Compliance with state law and/or regulations is no substitute for compliance with existing federal requirements. More typically, state circumvention or leniency with respect to federal intentions can result in problems (witness, for example, the federal demand for states to establish outdoor advertising programs and the threatened loss of federal funds in 1971) or increased pressure for federal action to obtain desired results.

The state may, of course, regulate more leniently if the matter regulated is not reachable by the federal government under its expressed or implied powers. No doubt, a large number of land use decisions will continue to be made without federal supervision; but, if recent deliberations on national land use policy legislation are any indication, some federal minimum requirements for the protection of critical areas, the regulation of major developments, etc., will be in effect in the near future. Whether these federal requirements will be primarily procedural or will take on some substantive characteristics remains to be seen. Whether the legislation will contain sanctions against state highway and other funding to compel state compliance is likewise uncertain at present.

In short, state permissiveness can be costly in direct, financial terms; it can also further weight the federal side of the federal/state balance.

4. More Stringent State Regulations

The general rule is that states are free to adopt more stringent regulations if the regulations do not conflict with the purposes manifested in Congressional activity on the same matter. State law and police power can be extended over the federal public domain unless and until Congress has determined to deal exclusively with the subject at hand.[72] Last, the exercise of such jurisdiction by the state cannot be inconsistent with the full power of the United States to control the use of public lands.[73]

V. State Alternatives With Respect to the Federal Government

Within the framework of the above general principles, the available alternatives for state involvement in federal-related activities can be reviewed.

A. Federal/State Advisory Boards and Agreements

Legislative action authorizing the creation of formal federal/state advisory boards is one solution. Such boards could regularize the contact between the

federal government and the state, and -- with public sessions -- could focus greater attention on federal/state interaction. However, as pointed out in a recent Oregon Law Review article on citizen advisory boards, the approach has its limitations.[74] Primary among these is the fact that advice can be rather freely ignored. This difficulty could be anticipated somewhat by stipulating a formal review and comment requirement and other procedures for state input, without which the state representatives could be compelled by state statute or regulation to withdraw from the advisory board meetings.[75] Formal findings of fact on matters of disagreement could also be required as a condition of state participation. Participation by legal counsel on behalf of the state could also be provided.

B. Complaint Procedures

Current Montana law contains an example of this approach:

> "The Montana state fish and game department shall observe and report to the Montana state fish and game commission concerning acts and omissions on the part of the government of the United States and its agencies within the state of Montana which do, will or might affect adversely the fish and wildlife resources, including but not limited to the fishing streams within the state, and upon receiving such reports, the said commission shall without delay send formal notification in writing, by certified mail, to the appropriate federal agency or agencies involved, setting forth in detail the appropriate objections of the state of Montana to the acts and omissions aforesaid. Said commission shall keep complete files and records, available for public inspection, of all matters and things done, and all communications and correspondence sent and received, pursuant to this section."[76]

Under this section, the Fish and Game Department and Commission are required, not merely authorized, to review and object to federal decisions which might adversely affect the fish and wildlife resource. The provisions have not been used to date.[77] Formal complaints such as the above do not carry the weight of mandamus, but they could effectively focus state and public attention on inappropriate federal activities.

The legislature could enact a more comprehensive statute requiring that all state agencies, within their areas of expertise, object to contrary federal

policies. Centralized filing of such correspondence and related documents would enhance the ability to determine where state and federal disagreements do exist.

Additionally, the state could continue to use the now-prevalent "memoranda of understanding" to clarify the relationship between the various federal and state agencies. These memoranda, however, typically only work until the chips are down.

Frank Grad, writing a few years ago, suggested the use of federal-state compacts which are hammered out between a state (or states) and the federal government and then ratified for specific time periods, by Congress.[78] This approach would give more stability to intergovernmental agreements and may even provide enforceability against all parties, including the federal government.[79]

C. State Participation and Control in Federal Decision-Making

The Public Land Law Review Commission Report outlined vaguely some suggestions for state and local government participation in federal land use planning. Recommendation 13 provides:

> "State and local governments should be given an effective role in Federal agency land use planning. Federal land use plans should be developed in consultation with these governments, circulated to them for comments, and should conform to state and local zoing to the maximum extent feasible. As a general rule, no use of public land should be permitted which is prohibited by state or local zoning."[80]

This recommendation was made for two reasons according to PLLRC: (1) state governments represent people and institutions most directly affected by federal land use programs; and (2) land use planning is incomplete if all land within the planning area is not considered, regardless of ownership. PLLRC felt that its recommendation went beyond the Intergovernmental Cooperation Act of 1968.[81]

Accordingly, PLLRC recommended that state involvement in federal land use decisions would be increased if the federal agencies were <u>required</u> (not merely exhorted) to submit their plans to the states. PLLRC also recommended a statute

that would allow judicial invalidation of federal decisions made without appropriate state/federal coordination.

Something akin to this recommendation can be found in the requirements of the National Environmental Policy Act (NEPA). That act provides in part:

> "it is the continuing policy of the Federal Government, in cooperation with state and local governments, and other public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (emphasis supplied)[82]

Similar language is found in Section 42-4332(c) wherein circulation of environmental statements to appropriate federal, state, and local agencies is required.

More importantly, Executive Order 11752 implementing NEPA, provides:

> "Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control...."
>
> "Heads of Federal agencies shall ensure that all facilities under their jurisdiction are designed, constructed, managed, operated, and maintained so as to conform to the following requirements: (1) Federal, State, interstate, and local air quality standards and emission limitations... (2) Federal, State, interstate, and local water quality standards and effluent limitations respecting the discharge of runoff of pollutants..."[83]

The provisions of the Executive Order recently received attention in litigation between the state of Kentucky (and others) and the federal Environmental Protection Agency.[84] In ruling that the federal Clean Air Act did not require federal agencies to obtain state permits for facilities, the Circuit Court held that procedural compliance with state laws is not required.

One commentator has suggested the following amendment to the federal Administrative Procedures Act[85] to establish more formal federal state cooperation:

> 1. Each agency may enter into cooperative agreements with state agencies whereby specified state statutes or rules are to be promulgated, enforced, or both promulgated and enforced whenever the agency finds that such agreements will aid it in the performance of its delegated duties, except as statutes expressly prohibit or restrict such agreements.
>
> 2. Each cooperative agreement shall include the names of the cooperating federal and state agencies and the state statute or rule to be promulgated, enforced, or both promulgated and enforced. Each cooperative agreement shall become effective upon publication in the Federal Register.
>
> 3. (a) No court of the United States or of any state shall hold (i) any state statute or rule included in any effective cooperative agreement or (ii) any state statute delegating power to a state agency to promulgate rules which are included in an effective cooperative agreement to be preempted or superseded by any federal statute delegating rule-making authority to a federal agency which is a party to the cooperative agreement or by any rule promulgated by such a federal agency unless the federal agency is made a party to the proceeding and the state statute or rule is irreconcilable with the federal statute or rule.
>
> (b) No state statute or rule shall be held to be irreconcilable with a federal statute or rule merely because it (i) imposes sanctions on different persons than does the federal statute or rule or (ii) regulates any matter differently than does the federal statute or rule.[86]

State consideration of such a provision is timely.

D. The Executive Branch of State Government

Montana law provides: "In addition to those [powers] prescribed by the constitution, the governor has the power and must perform the duties prescribed in this [section]....(4) He is the sole official organ of communication between the government of this state and the government of any other state or of the United States."[87]

As a matter of practicality, all state agencies -- and in particular the Department of Intergovernmental Relations -- have continuing contact with the federal government. Perhaps a more formalized channelling of these dealings

would increase their effectiveness. Assuring higher visibility for the federal/state coordinator might also help.[88]

Additionally, the power of the Governor to move swiftly with an executive order is not clearly provided in the Montana statutes. Although the use of an Executive Order would not bind federal agencies, it is one more tool that would increase the ability of state government to act quickly and decisively. Of course, adequate safeguards for the exercise of this power would need to be developed.

At the state level, more vigorous implementation of the federal/state coordination possibilities indicated in the federal Office of Management and Budget's Circular A-95 would be valuable.[89] These procedures, adopted under the previously discussed Intergovernmental Cooperation Act of 1968, advise, among other things, the circulation of federal land use plans and impact statements to state government for comment. Comprehensive lists of state reviewers should be supplied to federal agencies likely to be making decisions affecting environmental quality in the state. In each case, the state should be certain that relevant and competent participation occurs. Staffing the A-95 Clearinghouse with ecologically-trained and sensitive people would also help.

E. Congressionally-enforced Federal Compliance with State Law

The state could press Congress for more Congressionally endorsed and mandated compliance with state laws (such as the above-cited provisions of the Reclamation Act of 1902). This could be done through a variety of resolutions urging a strong state interest in specific areas, such as hard rock mining, utility and transmission line siting, etc.

F. State Regulation of Private Operators and Operations

As noted above, the state can regulate private activities in connection with federally owned resources and/or on federal lands <u>within bounds</u>. Care

must be taken to insure that an expressed federal purpose is not burdened or impaired.

G. A Word on Federal Funding

In addition to direct state involvement in federal land use and resource activities, federal funding for state land-use efforts is available from a variety of federal sources. However, it is not clear that all state agencies have the available information needed to obtain the funds. Assuring that all are aware of the types and amounts of funding is important. Overconcentration of funding information in one agency (the Department of Intergovernmental Relations) runs the risk of leaving the others in ignorance of the available funds. Perhaps to avoid competitive problems, the agency pursuing and disbursing the federal funds should not be one relying heavily on those funds for its own operation.

H. Conclusion

Perhaps some combination of the above alternatives, drafted as a comprehensive intergovernmental code, would be the best approach. But, the only long-run way for the states to avoid pre-emption -- not to mention irrelevance -- is to work diligently in areas in which the federal government and significant segments of the public find neglect too costly to tolerate. Consider, for example, the federal judicial activity in the civil liberties field. Federal judges agonized over the application of the federal Bill of Rights guarantees to the states for over 3/4 of a century. Finally, state inactivity in the area created a climate in which the states were compelled to abide by the federal guarantees -- not without controversy to be sure. Vigorous land use planning is an area wherein federal and public concern is clearly mounting. An active state commitment is the best course to insure that the primary initiative will remain at the state level.

VI. The Indian Presence

Earlier, it was mentioned that the various Indian tribes were deposed of their oboriginal titles to all the lands comprising the present state of Montana. The vacillating federal policies of the past have produced a complex and not thoroughly developed body of law, even though the treaties, statutes, regulations, court cases, books and articles on Indian law could fill a good-sized room.[90]

Recently in Montana there have been controversies over land-use activities on several Indian reservations: hunting and fishing access on Crow, timber harvest and land use control on Blackfeet, and water regulation on Flathead. These -- coupled with the potential for massive coal/energy development on the Crow and Northern Cheyenne -- have sharpened the attention paid to tribal sovereignty, jurisdictional questions, and cultural diversity.

A. Indian Lands

The reservation boundaries encompass 8,347,193 acres of land in seven reservations. Not all of that land is tribally owned land however. As can be seen in Table IV, a considerable acreage is allotted land and some has been patented in fee to private parties. Allotted land came into existence in the late 19th century when the federal government decided to convert Indian tribes to individual landowners and thence to status comparable to that of white Americans.[91] Midway through the process, in 1934, the federal government reversed itself with the enactment of the Indian Reorganization Act and placed allotted lands in trust on the theory that Indian cultural survival depended on bolstered tribal institutions and contiguous land holdings.[92]

The allotment system was judged to be a failure. In less than sixty years, two-thirds of all Indian lands, 91 million acres, were transferred to non-Indian ownership.[93] The intent of the 1934 Reorganization (Wheeler-Howard) Act was to

TABLE IV. Indian Reservation Acreage

RESERVATION	TRIBAL[A]	INDIVIDUAL	GOV'T	TOTAL BIA	FEE[B]	TOTAL RESERVATION[F]
Blackfeet	164,098.25	772,002.51	9,187.44	945,288.20	580,423.80	1,525,712
Crow	340,773.58	1,215,885.40	1,400.59	1,558,059.57	724,704.43	2,282,764
Flathead	561,027.43	52,079.25	1,017.00	614,123.68	628,572.32	1,242,696
Fort Belknap[C]	163,242.90	423,626,27	597.02	587,466.19	63,652.81	651,119
Fort Peck[D]	235,747.73	627,852.36	86,596.93	950,197.02	1,142,926.98	2,093,124
Northern Cheyenne[E]	269,521.54	163,911.99	0.68	433,434.21	10,722.79	444,157
Rocky Boys	107,612.76	0.00	0.00	107,612.76	0.00	107,613
TOTALS						8,347,185

Source: BIA, Annual Report of Acreage under BIA Jurisdiction, June 30, 1972.

[A]Since compilation of figures, some increase may have occurred in tribal ownership.

[B]Approximate. Calculated by subtracting BIA from total reservation acreage.

[C]Off-reservation, tribally owned land acquired under Indian Reorganization Act of 1934: 3,793 acres.
Off-reservation government holdings administered by BIA: 24,938.08
Off-reservation Turtle Mountain public domain allotment: 41,629.81

[D]Off-reservation Turtle Mountain allotment: 23,591.08

[E]Off-reservation Turtle Mountain allotment: 680.00

[F]Rounded to nearest acre.

conserve and develop Indian resources and to stabilize tribal organization, powers, and holdings.

During the period 1887-1934, however, non-Indians had settled on Indian reservations, generally holding fee title sold by individual Indians. Notwithstanding these land ownership patterns, Congress has essentially defined Indian lands to include all land located within the exterior boundaries of an Indian reservation.[94]

B. Indian Water Rights

As established by federal case law, Indian tribes possess water rights similar in many respects to those of the federal government's reserved rights. That is, an uncertain quantity of water was reserved at the time the various tribes agreed to treaties.[95]

Such water rights are similar to the federally reserved rights. They do not require diversion or use as do the typical rights acquired under the appropriation doctrine. Standard abandonment provisions do not apply. Compensation of existing appropriators is not required when the prior Indian right is exercised. The rights are uncertain in quantity and can be expanded to meet the reasonable present and future needs of the Indian reservations. The rights may also include -- in a quasi-riparian fashion -- a right to a particular quality of water.[96]

However, in one crucial respect, they may be different: Indian water rights may be one of a number of rights reserved from time immemorial by the various tribes. This is discussed in some detail below.

Earlier, it was mentioned that the first case leading to the federal reservation doctrine concerned the claims of a Montana Indian reservation (Fort Belknap). The Winters doctrine -- as it has come to be known -- is a vital, if hotly debated aspect of past and contemporary cultural survival and diversity. Long before Europeans (or Scandinavians) set foot on the continent, Indian tribes, especially

in the Southwest, had developed extensive irrigation projects for their arid lands. Numerous tribes adjusted their living patterns to the availability of water and the fertile river bottoms of the west.[97]

In 1906, the Ninth Circuit Court of Appeals, agreeing with a lower court, said:

> "'When the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk River' at least to the extent necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees."[98] (emphasis supplied)

In 1908, the U. S. Supreme Court was called upon to review the Winters decision and to consider whether water rights had to be explicitly reserved in treaties and whether reserved rights were destroyed by the admission of Montana to statehood. The Court answered in the negative on both counts.[99]

But, in doing so, the Supreme Court seems to have been of the opinion that the federal government reserved the water for the Indians: "The lands were arid and without irrigation, were practically valueless. An yet, it is contended, the means of irrigation were deliberately given up and deliberately accepted by the Government."[100]

Additionally, Arizona v. California appears to announce with greater clarity that the reservation was made by the United States on behalf of the tribes: "We... agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created."[101] (emphasis supplied)

If the Supreme Court ultimately accepts the position that the federal government took possession and then reserved water rights for all the tribes, the priority date for Indian water rights will probably be the date of relevant treaties. In other words, the rights would be invested rights.

If, however, the Court should accept the position that the tribes themselves reserved those rights (or if the federal reservation was of the character of a recognition of pre-existing rights), the rights would be "immemorial" and the position of Veeder would be affirmed: Against Indian [water] rights, which "stem from the fact that title to those rights has always resided in the American Indians" there would be no interests which could be prior in time or right.[102]

The Ninth Circuit Court had held that at the time the Indians signed treaties with the U. S. Government, the Indians had control of all the lands and waters of the area for whatever uses they chose. They did not cede all these rights to the federal government. Consequently, the rights claimed by the tribe were held to be rights reserved by the tribe -- not rights granted back to the conquered tribe by the Government.[103]

Given the situation at the time of treaty-making, the position of the Ninth Circuit Court seems most tenable. However, the position has not received much support. Veeder[104] cites impressive legal precedent including language quoted in the Winters case: "... the treaty [of 1855] was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted."[105] He at least establishes that federal law may not have reached final clarity on the question whether the rights were reserved by the Indians or by the government on behalf of the Indians.

In the above-discussed Eagle case, the U. S. Supreme Court came quite close to holding that Indian reservations are not distinguishable from the other federal reservations with respect to state adjudication of water rights.[106] However, the Court was not considering directly the claim of an Indian reservation and, apparently did not have before it for comment the distinction between "immemorial" and "invested" water rights.[107] Therefore, at this time, it is unlikely that Indians can be compelled to argue their water rights in state court proceedings.

Even if the tribes are held to have reserved the water themselves at the time of treaty, there is still the vexing problem that a treaty, and apparently the various understandings that went with it, can be superseded at any time by an act of Congress.[108]

In 1908, the Ninth Circuit Court indicated the paramount rights of the Indians included the right to obtain additional water if their needs dictated it.[109] A much later case, Arizona v. California, reiterated this point:

> "The water was intended to satisfy the future as well as the present needs of the Indian reservations.... How many Indians there will be and what their future uses will be can only be guessed....The only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[110]

More recent sources, while agreeing that some quantification of Indian water rights would help, argue that irrigable acreage can not be the only standard for "reasonable present and future needs."[111] Veeder urges that some reservations may not be well-suited to irrigation, but that stock raising, recreational, scenic, aesthetic, industrial, and municipal uses may be important. Leaphart agrees that Indian needs extend beyond irrigation.

More important may be the question whether Indian water rights can be used by private parties.[112] Leaphart notes that other reservation resources--minerals, oil and gas, farmland, and timbered lands--may be leased or sold. "Reserved water rights appear to be the only major natural resource that Congress has not included within the leasing provisions."[113] A little later he advocates that the lease or sale of Indian water rights be allowed.[114] However, he overlooks the fact that the outright sale of Indian water rights could be fairly dangerous in terms of tribal survival, especially given the prospects of coal development and the probable high price that would be offered for the early-dated Indian water rights. The adverse consequences of such sales could go unnoticed for some time.

In the Act of August 9, 1955, Indians were allowed to lease lands for up to 50 years of industrial, commercial, residential and other purposes.[115] The major purpose of the act was to "increase Indian income, by opening Indian land to market forces and encouraging long-term leases for commercial purposes."[116] However, the cultural and socio-economic costs of such development were not a concern in the legislation.[117] The same mistake made with respect to Indian water could lead to more serious difficulties than the problems encountered with land leases.

In any case, the leasing of Indian water rights is apparently becoming an accepted practice.[118] It was suggested in the 1918 edition of Federal Indian Law that leasing of Indian water might subject it to state law on appropriation and use through regulation of the private lessee.[119] However, it is doubtful at this time.

VII. Indian Sovereignty and the State Position

One commentator recently noted the unyielding complexity of the state/Indian relationship:

> "Defining the legal relationship of a state to reservation Indians within a state's boundaries is a problem with which this nation's courts have struggled from the earliest days of the Republic. The problem has not submitted to solution by way of principles uniformly understood and consistently applied. Confusion and inconsistency is more the rule than the exception."[120]

The general business of Indian sovereignty was first expressed in Worcester v. Georgia.[121] In that 1832 U. S. Supreme Court decision, Chief Justice John Marshall announced a number of propositions that, although not since unanimously agreed upon, seem destined again to become a lodestar in Indian law. Marshall wrote:

> "The Indian tribes have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power..."[122]

Although conquest by the United States probably extinguished the external powers of the tribe, internal sovereignty remains, its extent only recently beginning to emerge (subject to modification by Congress).[123] The controlling principle of Indian law at present is that states do not have jurisdiction on Indian lands except as authorized by Congress.[124] In 1948, after years of judicial inconsistency and statutory vacillation,[125] Congress attempted the following definition of "Indian country."

> "Except as otherwise provided in Section 1154 and 1156 of this Title, the term 'Indian country' ...means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights of way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including the rights-of-way running through the same.[126]

It may seem curious that Indian tribes and affairs are in many respects less subject to state law than they were prior to the passage of a federal law designed to increase state jurisdiction. However, this is ironically the case, as can be demonstrated through a review of the Montana state constitution, case law, and the Indian Civil Rights Act of 1968 (a series of amendments to what is called Public Law 280).

A. Ordinance I, Section 2

Before Montana entered the Union in 1889, Congress required by Enabling Act the inclusion of the following wording as Montana's Ordinance I, Section 2:

> "That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, ...that no taxes shall be imposed by the said state

> of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe."

In short, the state was required to disclaim any jurisdiction over Indian lands. Ordinance I, Section 2 was reaffirmed in the 1972 Montana state constitution, with the adoption of the following languages Article I:

> "All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, apprended to the Constitution of the state of Montana and approved February 22, 1889, any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana."

One commentator recently noted that the seemingly direct language of this and nearly identical state disclaimers "inexplicably mean different things to different courts."[127] In 1891, federal court in Montana ruled that the ordinance precluded state jurisdiction, defined to include "the power of governing such lands; to legislate for them; the power or right of exercising authority over them."[128] The court went on to say:

> "When we speak of the right to govern certain lands, we not only mean the right to do something with the land itself, but to legislate for and control the people upon said lands, as well as to legislate concerning the land itself. When we say Congress has the right to legislate for a place within its exclusive jurisdiction, we mean for the people who are there, as well as concerning the land itself."[129]

In 1951, the Montana Supreme Court cited this language approvingly.[130]

However, by 1972, the state Supreme Court, influenced by Congressional and state legislative activity, was ready to change this situation somewhat. In the McDonald[131] case, the state Supreme Court held that Montana was not

required to amend Ordinance I, Section 2 before assuming jurisdiction over criminal acts on the Flathead reservation. The Court argued that the Congressional intent of Public Law 280 was that states assume binding jurisdiction over Indian affairs. The case was not appealed as, on remand, defendant pled guilty to a lesser charge.

Whether or not Congressional intent is sufficient to override Enabling Acts and Ordinances, the principle of the McDonald case, decided before the 1972 state constitution was ratified, is placed in jeopardy by that constitution. Article I clearly reaffirmed the provisions of the Ordinance.

Further, the Convention Debates indicate quite clearly the Convention intent in adopting Article I. Delegate Schiltz noted that "...this particular article [Article I] is in answer to a request by the various Indian tribes of Montana..."[132] and urged that:

> "we considered... that it was necessary to put something in the Constitution to acknowledge that the old enabling act requirements were still in full force and effect in this new Constitution, and to note particularly that the general language that the declaration of all lands owned or held by Indians and Indian tribes shall remain under the jurisdiction and control of the Congress of the United States."[133]

Article I was adopted without audible negative vote on second reading, and by a roll call vote of 96-0 on third reading.[134]

It seems that prior to assuming any jurisdiction under Public Law 280 or subsequent Congressional authorization, the Montana Constitution's Article I would have to be amended.[135] That is what the Montana Inter-tribal Policy Board and others requested from the State Convention and the Convention intended to accept their position. Even if, technically, the Ordinance need not be amended, clarity would be served by doing so; the delays of litigation may also be avoided. Of course, the crucial prior question is whether the state ought to attempt the assumption of jurisdiction.

B. Public Law 280

In 1953, the U. S. Congress was leaning once again toward termination of the federal trust relationship toward Indian tribes and assimilation of the various Indian cultures into the mainstream of American life. Accordingly, Congress enacted Public Law 280 -- a law designed to extend state jurisdiction over Indian affairs.[136]

By that act, California, and several other states, were given outright criminal and civil jurisdiction over Indian tribes. And, in a recent California case, the application of a zoning ordinance to Indian trust lands under that act was upheld.[137] However, Montana was not one of the states directly granted jurisdiction. Montana, and the other so-called "optional Public Law 280" states were permitted to obtain jurisdiction over Indian affairs as follows:

> "The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act [P.L. 280], to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to assumption thereof."[138]

Montana did bind itself to assume criminal jurisdiction on the Flathead reservation; additionally, a conditional offer of state jurisdiction was made to the Confederated Salish and Kootenai Indian tribes.[139] No request for assumption of jurisdiction was received from the Confederated Salish and Kootenai; therefore, Montana currently has criminal and perhaps limited civil jurisdiction only on the Flathead reservation (unless the state Supreme Court is eventually reversed in its previously-discussed McDonald position). The acceptance of this jurisdiction was challenged in the McDonald case in 1972.[140] The state Supreme Court ruled that the state jurisdiction was valid even though the tribe, on several occasions sought to revoke the offer of jurisdiction. As noted above, the case was not appealed.

In 1968 -- with Congressional enactment of the Indian Civil Rights Act -- an additional requirement was added for the assumption of state jurisdiction:

> (a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.[141]
> (emphasis supplied)

An identical section provides the same requirements for state assumption of civil jurisdiction.[142] A further section specifies that tribal consent occurs "only where the enrolled Indians within the affected area...accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose."[143] Two recent Montana cases -- one on reversal by the U. S. Supreme Court -- held that the tribal councils of the Northern Cheyenne and the Blackfeet tribes could not obtain state jurisdiction absent strict compliance with the above Congressional requirements and affirmative state action accepting the tribal action.

Thus, as matters now stand, consent of the enrolled adult members of the tribe -- not just the tribal council -- is an essential prerequisite to the assumption of jurisdiction by the state; and, only strict compliance with that

referendum requirement can yield binding state jurisdiction. Some state Supreme Court inclination to change this situation has been evidenced in the 1970's, however. After the Kennerly ruling, the Montana Supreme Court appeared ready to accept the U. S. Supreme Court position. In Crow Tribe of Indians v. Deernose, the Montana Court wrote:

> "It is abundantly clear that state court jurisdiction in Indian affairs on reservations does not exist in the absence of an express statutory grant of such jurisdiction by Congress together with strict compliance with the provisions of the grant..."[144]

However, by 1973, the state Court first noted that Kennerly was controlling and then added: "and the state cannot exercise civil jurisdiction where it interferes with the self-government of the Flathead Tribe."[145] In the same year, the Court was back to the position that:

> "as long as the state does not...attempt to exercise jurisdiction over areas of law where there is a governing Act of Congress or an infringement on reservation self-government, it may continue to exercise jurisdiction..."[146]

In fact, the Court even made mention of residual state jurisdiction over Indians.[147]

One commentator has written that "if the United States Supreme Court truly is of the opinion that Public Law 280 is today the only avenue to state assumption of jurisdiction over Indian affairs it has clearly failed to make manifest this opinion to the state courts."[148] This appears to be true with respect to the Montana court which, in a recent case, expressed its disenchantment with the notion of Indian sovereignty.

Even after a state has obtained jurisdiction consistent with Public Law 280, a general 'savings' clause further binds the extent of such jurisdiction:

> "Nothing in this act shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in any manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto."[149]

The key phrasing in this section prohibits the state alienating, encumbering, or taxing Indian real or personal property (although the state apparently can tax a non-Indian lessee).

Prior to and since the enactment of the 1968 amendments, some states attempted to use the language of a 1959 U. S. Supreme Court case (Williams v. Lee) to assume jurisdiction over Indian affairs.[150] Indeed, this appears to be the present course of the Montana Supreme Court described above. In that case, the U. S. Supreme Court offered what has come to be known as the "infringement test" for state jurisdiction: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[151] (emphasis supplied)

In the McClanahan case, the U. S. Supreme Court held that Public Law 280 as amended is "a governing act of Congress."[152] This means essentially that the procedures of that act are the only avenue for state assumption of jurisdiction on Indian affairs.[153] In other words, jurisdiction probably cannot be extended without enrolled tribal member consent.

The irony in this business is that under Public Law 280 and its 1968 amendments -- a statute that was enacted to increase state jurisdiction -- the chances that further state jurisdiction can be acquired are slim.

C. Water Rights

The state role with regard to Indian water rights is even more limited than with land. In fact, and the same may apply to the federal government if Indian water rights are immemorial, caution is important in the planning of any non-Indian water-related project using water which might be affected by Indian claims. Prior rights could be asserted at inopportune times for non-Indian investors.

When it comes to the water rights of the Indians within the state, Montana's constitutional and statutory claims of state water ownership ring hollow. The state may be able to secure state court adjudication of Indian water rights (although it's doubtful at this time); or, the state may be able to convince the federal courts that quantification of Indian water rights is appropriate. In either case, the prospects for state control of the size of Indian water rights or the timing of the exercise of these rights are dim.

D. A Word on Fee Lands

By at least one case, state conservation laws are applicable to Indian and non-Indian alike on non-tribal land.[154] However, the case cited did not deal with lands within the exterior boundaries of a reservation.

Whether states can exercise complete jurisdiction over Indians on non-Indian land within the boundaries of a reservation is uncertain. But the trend of legal opinion may be heading in an opposite direction. Two well-reasoned articles recently urged that non-Indians should be subject to Indian law and courts while residing or travelling within the exterior boundaries of an Indian reservation.[155] The Blackfeet proposed Tribal Constitution expresses the same sentiment, announcing tribal jurisdiction over all lands and activities within the exterior boundaries of the Blackfeet reservation.[156] Some controversy has been engendered however.

A detailed investigation of individual treaty situations -- beyond the scope of this paper -- may shed some light on this problem.[157]

Last, state jurisdiction does apply to non-Indians and non-Indian affairs in Indian country where no Indian interest is at issue.[158] For example, the Department of State Lands could perhaps regulate a non-Indian surface mining operation on non-Indian land within the boundaries of a reservation and can probably regulate the use of state lands within the boundaries. Apparently, however, that type of piecemeal uncertainty is the current limit of general state jurisdiction within reservation boundaries.[159]

VIII. State Alternatives with Respect to the Indian Reservations

It has been argued above that the field for state action is much broader on federal lands than on Indian lands -- and, perhaps, much broader than it is on any lands within the exterior boundaries of the reservation. One might logically suggest that this cannot be so, since in current legal interpretations the federal government is sovereign over the Indian tribes.[160] To explain this seeming irony by recapitulation: The Montana Constitution contains a provision that binds the state not to assume further jurisdiction. Additionally, the federal government has, by the Indian Civil Rights Act of 1968, precluded entirely the further assumption of civil or criminal jurisdiction by Montana and similarly situated states until a specific kind of tribal consent is obtained.

Several alternatives for a closer state/Indian relationship can be listed. The state could maintain the present course, thereby leaving to state and federal courts the determination of specific conflicts as they arise. The state could push for federal repeal of the Indian Civil Rights Act of 1968, or could attempt to gain civil and/or criminal jurisdiction over the reservations by persuasion of the tribes to consent. Neither possibility seems realistic given the increasing cultural awareness and political clout of the tribes. Where the latter was tried and partially accomplished in Montana (the Flathead reservation), tensions and legal difficulties have not been reduced.

Realistically, there seems to be only one alternative: cooperative effort. The tribal sovereignty and cultural diversity of the tribes could be recognized as a state public policy; state governmental functions relative to Indians could could be consolidated; and a genuine effort to work out land conflicts could be undertaken with the Indian tribes' sovereignty clearly recognized. In other words, cooperative ventures designed to enhance the operation of Indian institutions and self-government appear to be the only answer. A legislative framework for such cooperation would be helpful. The state could play a vital role assisting Indian

tribes in the drafting and implementation of their own mining, energy, and land use legislation.

Such an approach has difficulties. For example, representing non-Indians in tribal government is an unyielding problem. However, the major advantage is that there would be opportunity for a more consistent program of land use control than would obtain under the alternatives.

IX. Summary of Findings and Conclusion

This paper has examined the role of the state government in federal and Indian land and water use decisions. Methods by which and the extent to which the state might influence those decisions were discussed although specific cases can involve patient scrutiny of federal regulations, executive orders, and Indian treaties beyond the scope of this effort, the general principles forming the basis of individual decisions are offered. Some available alternatives for consideration are summarized here. Reference to the complete paper will provide supporting detail.

The State and the Federal Government

The federal government clearly has final authority to regulate land use practices affecting federal lands, resources, or functions if it chooses to exercise this authority. Even so, a more formal state presence in federal land use and resource decisions could be beneficial. Several alternatives have been explored. They include: formal state-federal advisory committees and agreements; unilateral state advisory committees or prodding activities; consistent state participation in federal decisions under a more fully implemented National Environmental Policy Act and other statutes; Congressionally-enforced compliance with state land use policies or regulations; consistent state police powers,

regulation of operators and/or operations on federal lands to the extent not pre-empted by the federal government; and more adequate findings for the implementation of the Water Use Act. All of the above have limitations, but the arena of federal/state land use control will never be entirely clear nor stable.

Additionally it should be kept in mind that state policy objectives affecting federal lands and/or resources will be considered and evaluated within the framework of national policy objectives.[161] As Frank Grad pointed out recently:

> "The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths 'States-rights' and 'National Supremacy'. We must not deny ourselves new or unfamiliar modes in realizing national ideals." "the states will fail in this effort if they regard...[new opportunities] as an affirmation of a narrow concept of state sovereignty. They may succeed if, along with the assertion of legitimate interests of their own, they regard their role as historic, independently functioning parts of a regional polity and of a national union."[162]

Perhaps drafting the above in some form of intergovernmental code would lend careful organization to the state position.

Daniel Elazar has noted the importance of active state governments confronting national issues:

> "Today there is simply no justification for thinking that the states and localities, either in principle or in practice, are less able to do the job than the federal government. In fact, there is some reason to believe that, even with their weaknesses, they will prove better able to restore public confidence in America's political institutions."[163]

More to the point, since maintaining public confidence is only one of the functions of government, the states can make a vital contribution to important public decisions. The challenge to do so is nowhere greater than in the broad range of land use practices; if the state is to develop and maintain a credible presence in federal land use decisions, care must be taken that the state participation is for broad, public interest reasons -- not for narrow, strictly monetary,

or short-run advantages. The latter approach will rightfully enhance the ability of the federal government to make unilateral decisions on land use activities, buttressed by a claim that the state is disagreeing on parochial grounds.

As noted in the complete paper, a special and demanding legal relationship exists, and will continue, between the state and the seven Indian reservations. The state is probably precluded from assuming any further jurisdiction over Indian affairs (people, land, water, or activities). Within the boundaries of the reservations only non-Indians and non-Indian affairs are subject to state control--and even this principle is under some scrutiny.

For an effective state/Indian relationship to emerge, a special moral understanding of Indian interests will probably be required. The state will have to recognize that guaranteeing cultural integrity is an important Indian priority. A careful kind of state cooperation perhaps reflected in specific legislation which respects Indian commitment to tribal sovereignty is the only apparent solution. In this way, the state and the Indian tribes may be able to build a cooperative relationship that is beneficial to both parties and to the land.

FOOTNOTES

1. The term culture is used here because there are distinct value patterns and perspectives that deserve consideration when discussing White and Indian interaction. Additionally, these distinctions have influenced federal and state policy toward the various Indian cultures. Given increasing recognition of the importance of cultural diversity and tribal self-government, it seems that cultural distinctions will continue to play an important role in public policy and law. They should be recognized as such. See "Indian demands, policy to remain under Ford," Great Falls Tribune, August 19, 1974.

2. See Ronald Anthony Suppa, "Federal Jurisdiction--State Ecological Rights Arising Under Federal Common Law" Wisconsin Law Review (1972): 597-612; and Winton D. Woods, Jr. and Kenneth R. Reed, "The Supreme Court and Interstate Environmental Quality," Arizona Law Review 12(4) (1970): 691.

3. Consult any major ecology textbook for this insight, e.g., Howard T. Odum, Environment, Power, and Society (New York: John Wiley and Sons, Inc., 1971).

4. Benjamin Horace Hibbard, A History of Public Land Policies (Madison: University of Wisconsin Press, 1965); Vernon Carstensen, The Public Lands (Madison: University of Wisconsin Press, 1968), and Marian Clawson and Burnell Held, The Federal Lands (Baltimore: John Hopkins, 1957). Bernard DeVoto, ed., The Journals of Lewis and Clark (Boston: Houghton, Mifflin and Co., 19531. v-xxv. For earlier public land history, consult "Compiler," Laws of the United States, Resolutions of Congress Under the Confederation, Treaties, Proclamations, and Other Documents Having Operation and Respect to the Public Lands, (Washington)" Edward DeKrafft, 1817 , pp. 5-6

5. Hibbard, Ibid. p. 16

6. James P. Barry, The Louisiana Purchase, April 30, 1803 (New York: Franklin Watts, Inc., 1973); James K. Hosmer, The History of the Louisiana Purchase (New York: Appleton, 1902); and James Q. Howard, History of the Louisiana Purchase (Chicago: Callaghan & Co., 1902). Burt Hirschfeld, Forty Cents an Acre, New York: Simon & Schuster, 1965)

7. Hibbard, op. cit., pp. 19-20.

8. In general, see Felix Cohen, Handbook of Federal Indian Law (Washington U. S. Government Printing Office, 1942).

9. See Robert Ericson and D. Rebecca Snow, "The Indian Battle for Self-Determination," California Law Review 58 (1970): 445.

10. Hibbard, op. cit., pp. 8-9

11. See, for example, Memorandum to William Christiansen and the Montana Energy Advisory Council, from John Goers, Lieutenant Governor's Office files. July 2, 1974.

12. Consult file of memoranda and miscellaneous materials, Bonneville Power Adminstration, Environmental Quality Council files.

13. See 39 FR 26038 (July 16, 1974).

14. See National Park Service, U. S. Department of the Interior, Final Environmental Impact Statement: The Bighorn Canyon Transpark Road.

15. See Samuel C. Wiel, Water Rights in the Western States (San Francisco: Bancroft-Whitney, 1905); and Wiel, "Fifty Years of Water Law," Harvard Law Review 50 (1936): 252

16. See 43 USC 661 and 43 USC 321 (1970), respectively.

17. Beneficial use has been liberally construed in most jurisdictions to include such things as domestic, municipal, irrigation, stock watering, mining, milling, power generation, manufacturing, railways, refrigeration, fish and wildlife, fire protection, parks, recreation, scenic, navigation, and groundwater recharge for reservoirs. See Robert Emmet Clark, ed., Waters and Water Rights, Vol. I (Indianapolis: Allen Smith, 1967), p. 89.

    Of course, the actuality of beneficial use depends on the facts and circumstances of each case. See, e.g., Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 45 P. 2d 972, 1007.

18. Gerald R. Miller, "Indians, Water, and the Arid Western States," Utah Law Review, 5 (1956): 495, 496.

19. 43 U.S.C. 383.

20. U. S. v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 703.

21. 207 U. S. 564.

22. Arizona v. California, 373 U. S. 546.

23. Conrad Investment Co. v. U. S., 161 Fed. 829, 832; and Ibid., at 601.

24. U. S. v. District Court In and For the County of Eagle, et al., 401 U.S. 520.

25. 43 USC 666(a)

26. 401 U. S. 523

27. 401 U. S. 526.

28. United States v. District Court In and For Water Division No. 5 et al., 401 U. S. 527, 529-30.

29. Avondale Irrigation District v. North Idaho Properties, Inc., No 11370, Supreme Court of Idaho, June 27, 1974.

30. Supra note 23.

31. See Richard A. Hillhouse, "The Federal Reserved Water Doctrine," Land and Water Law Review 3 (1968): 75, 94-101.

32. A memorial is a common term used interchangeably with the term resolution, a legislative expression of sentiments typically adopted by one or both houses of the legislature.

33. According to one source, the uncertainty is more potential than actual at this time. Only one case of conflict had emerged by 1970 and, since there was enough water for both the Forest Service and the private party, "bourbon may be diluted, teeth brushed and toilets flushed at both locations." Frank J. Trelease, "Water Resources on the Public Lands," Land and Water Law Review, VI (1970): 89, 93, n.11.

34. Charles E. Corker, "Federal-State Relations in Water Rights Adjudication and Administration," Rocky Mountain Mineral Law Institute 17 (1972): 579; James Munro, "The Pelton Case," Oregon Law Review 50(1971): 322; Hillhouse op.cit.; Laurie B. Craig, "Limiting Federal Reserved Water Rights through State Courts," Utah Law Review (1972): 48; Lamond R. Mills, "Federally Reserved Rights to Underground Water," Utah Law Review (1973): 43. David S. Bradshaw, "Water in the Woods," Stanford Law Review 20 (1968): 1187; Frank J. Trelease, "Water Resources on the Public Lands," Land and Water Law Review VI (1970); 89; Charles E. Corhen, "Let There Be No Nagging Doubts," Land and Water Law Review VI (1970): 109; and Charles J. Meyers, "The Colorado River," Stanford Law Review 19 (1966): 1, 65. But, see also, Walter Kiechel, Jr., and Kenneth J. Burke, "Federal-State Relations in Water Resources, Adjudication and Administration," Rocky Mountain Mineral Law Institute 18(1973): 531; Note, "Federal Water Rights Legislation and the Reserved Lands Controversy," Georgetown Law Journal 53 (1965): 750; and William H. Veeder, "The Pelton Decision," Montana Law Review 27(1965):27.

35. Hillhouse, op. cit., p. 101.

36. Craig, op. cit. pp. 55 f.

37. Public Land Law Review Commission, One Third of the Nation's Land (Washington D. C.: U. S. Government Printing Office, June, 1970); pp. 147, 149. Hereafter cited as PLLRC Report. For a thorough review of the report, see Land and Water Law Review VI (1970): 1-457; and Natural Resources Council of America, What's Ahead for Our Public Lands.

38. See Eva H. Morreale, "Federal Power in Western Waters," Natural Resources Journal 3 (May 1963): 1; and Eva Morreale Hanks, "Peace West of the 98th Meridian," Rutgers Law Review 23(1968): 33.

39. 89-865 et. seg., R. C. M., 1947.

40. Article 7 Clause 2 U. S. Constitution.

41. 4 Wheat. 316, 436.

42. Article 4, Section 3, Clause 2. U. S. Constitution.

43. U. S. v. City and County of San Francisco, 310 U. S. 16.

44. Ibid.

45. Light v. U. S. 220 U. S. 523.

46. Consult, 16 C.J.S. 174-198.

47. See, for example, D. N. DeWees, "Economic Considerations in the Selection of Pollution Control Legislation," Ossoude Hall Law Journal 10(1972): 627; Note, "Economics and the Environment," Wayne Law Review 19(1972): 181; and note, "Taxation as a Tool of Natural Resource Management," Ecology Law Quarterly 1(1971): 749. But see also "Coase Theorem--Part II Symposium Natural Resources Journal 14(1974): 1-86.

48. 16 C. J. S. 174, supra note 66.5.

49. Gregory R. Rost and James A. Bailey, Responses of Deer and Elk to Roads on the Roosevelt National Forest, (Fort Collins: 1974); and "Colorado State University, United States Forest Service et. al., Cooperative Elk Logging Study: Progress Report (Missoula: U. S. Department of Agriculture, Forest Service, July, 1974).

50. U. S. Forest Service, Friday Newsletter, No. 32. August 16, 1974, U. S. Department of Agriculture, Office of the Chief, U. S. Forest Service, Washington, D. C.

51. Wisconsin Central R. Co. v. Price County 133 U. S. 504; U. S. v. Board of Commissioners of Fremont County 145 F 2d. 329, Cert. denied. 323 U. S. 804.

52. 50-1201, et. seg., 50-1301 et. seg., and 50-1034 et. seg., R. C. M., 1947.

53. 50-1304, R. C. M., 1947.

54. 50-1305, R. C. M., 1947.

55. 50-1223, R. C. M., 1947.

56. Harrop A. Freeman, "Dynamic Federalism and the Concept of Pre-emption," DePaul Law Review XXI (1972): 631; Howard Lesnik, "Preemption Reconsidered," Columbia Law Review 72(1972): 469; Sterling David Simpson, "Constitutional Law," Washburn Law Journal 13(1974): 118; Kenneth L. Hirsch, "The Impact of Preemption on Federal-State Cooperation," Law Forum (1967): 656; and Hirsch, "Toward a New View of Federal Pre-emption," Law Forum (1972): 515; David E. Engdahl, "Preemptive Capability of Federal Power," University of Colorado Law Review 45(1973): 51. Not only is the term spelled differently in the above, it is considered in different lights.

57. Utah Power Co. v. U. S., 243 U. S. 289; U. S. v. Hunt 19 F. 2d 634; and U. S. v. Thompson, 41 F. Supp. 13.

58. Texas Oil and Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, Affirmed 406 F. 2d 1303.

59. Ibid., see also Omaechevarria v. Idaho, 246 U. S. 343, and text below.

60. Northern States v. Minnesota, 447 F. 2d 1143, affirmed 405 U. S. 1035.

61. Ibid., 477 F. 2d 1143, 1145-1147 and cases cited therein.

62. 30 U. S. C. 181-287 (1970).

63. 30 U. S. C. 187. A virtually identical clause is contained in the Mineral Leasing Act for Acquired Lands, 30 U. S. C. 351-59, 357 (1970).

64. Texas Oil and Gas Corp. v. Phillips Petroleum Co., 406 F. 2d. 1303, cert. denied, 396 U S 829.

65. Edward B. Berger and William J. Mounce, "Applicability of State Conservation and Other Laws to Indian and Public Lands," Rocky Mountain Mineral Law Institute 16 (1970): 347, 354.

66. 50-1034 et. seg., R. C. M. 1947.

67. 50-1601 et. seg., R. C. M. 1947 (1974 Interim Supplement).

68. 4 Wheat. 316.

69. 42 U. S. C. 1857 (d).

70. Kentucky v. Ruckelshaus 6 ERC 1644.

71. Butte City Water Co. v. Baker, 196 U S 126.

72. Texas Oil and Gas Corp. v. Phillips Petroleum Co., 406 F. 2d. 1303, cert. denied, 396 US 829.

73. Utah Power Co. v. U. S., 243 U. S. 309; U. S. v. Hunt, 19 F. 2d. 634; and U. S. v. Thompson, 41 F. Supp. 13.

74. Michael P. Ryan, "The Role of Citizen Advisory Boards in the Administration of Natural Resources." Oregon Law Review 50(1971): 153.

75. For similar precedent, see Montana Natural Areas Act, 82-2710(2), R.C.M., 194_.

76. 26-1508, R. C. M., 1947.

77. Personal Communication, James A. Posewitz, Department of Fish and Game, August, 1974.

78. Frank P. Grad, "Federal-State Compacts," Columbia Law Review 63 (1963): 825.

79. West Virginia ex. rel. Dyer v. Sims, 341 U. S. 22; Seawright v. Stokes, 44 U. S. 151; Collins v. Yosemite Park Co., 304 U. S. 518.

80. PLLRC Report, p. 61.

81. 42 U. S. C. 4231 et. seg.

82. 42 U. S. C. 4331 (a).

83. E. O. 11752 (35 F. R. 34783) supersedes E. O. 11507, Feb. 4, 1970 (35 F. R. 2573) Quoted material is from Sec. 1 and Sec. 4(a).

84. Kentucky v. Ruckelshaus, 6 ERC 1644.

85. 5 U. S. C. 1001-11.

86. Hirsch, op. cit., (1967), p. 664.

87. 82-1301, R. C. M., 1947.

88. See 82A-2101, R. C. M., 1947.

89. Office of Management and Budget, Circular A-95, Office of the President, Washington, D. C.

90. Ericson and Snow, op. cit., p. 445 F.

91. General Allotment Act of 1887, 25 U. S. C. 331 et. seg. See 24 Stat. 388 (1887) for original provisions.

92. 48 Stat. 984, 25 U. S. C. 461-79.

93. Department of the Interior, "Report of the Commissioner of Indian Affairs," Annual Report of the Secretary of the Interior (Washington: U. S. Government Printing Office, 1933) pp. 68, 108, 109.

94. Marvin J. Sonosky, "State Jurisdiction Over Indians in Indian Country," North Dakota Law Review 48 (1972): 551 See also 42 C. J. S. 67, 68; 41 Am Jur 2d 55.

95. See, in general, Price, op. cit., pp. 310-329; Harry B. Sondheim and John R. Alexander, "Federal Indian Water Rights," Southern California Law Review 34 (1960): 1 ; Gerald R. Miller, "Indians, Water, and the Arid Western States," Utah Law Review (1972): 495; William H. Veeder, "Winters Doctrine Rights," Montana Law Review 26(1965): 149; and Veeder, "Indian Prior and Paramount Rights to the Use of Water," Rocky Mountain Mineral Law Institute 16(1971): 631; Paul L. Boom, "Indian 'Paramount' Rights to Water Use," Rocky Mountain Mineral Law Institute, 16 (1971): 669.

96. Price, Ibid., p. 319.

97. William H. Veeder, "Indian Prior and Paramount Rights to the Use of Water," Rocky Mountain Mineral Law Institute 16 (1971): 649.

98. Winters v. U. S., 143 F. 740, 749.

99. Winters v. U. S., 207 U. S. 564.

100. Ibid., p. 576.

101. Arizona v. California, 373 U. S. 546, 600.

102. Veeder, "Indian Prior and Paramount Rights," op. cit., p. 649.

103. Winters v. U. S., 143 F. 740, 749.

104. Veeder, "Winters Doctrine Rights in the Missouri River Basin," unpublished manuscript, EQC files. 24p.

105. U. S. v. Wihaus, 198 U. S. 371, 381. See also, text above note 98.

106. 401 U. S. 523.

107. C. F. Veeder, "Indian and Prior and Paramount Rights," op. cit., p. 648-9.

108. See Anderson v. Gladden, 188 F. Supp. 666, 676 and references cited therein.

109. Conrad Investment Co. v. U. S., 161 Fed. 829.

110. Arizona v. California, 238 U. S. 423.

111. William H. Veeder, "Winters Doctrine Rights," Montana Law Review, 26(1965): 149; and Bill Leaphart, "Sale and Lease of Indian Water Rights," Montana Law Review 33 (1972): 266.

112. See U. S. v. Powers 305 U. S. 532.

113. Leaphart, Ibid., p. 275.

114. Ibid. p. 276.

115. 25 U. S. C. 415 (a).

116. Reid Peyton Chambers and Monroe Price, "Regulating Sovereignty," Stanford Law Review 26 (1974): 1061, 1074.

117. See Chambers and Price, Ibid., for a discussion of leasing policy and the broader consideration.

118. See, for example, State ex. rel. Ray v. Hibner, 27 F. 2d. 909.

119. Federal Indian Law, op. cit., p. 671. n. 40.

120. John F. Sullivan, "State Civil Power Over Reservation Indians," Montana Law Review 33 (1972): 291.

121. 6 Pet. 515.

122. Ibid., 559.

123. U. S. Department of the Interior, Federal Indian Law (Washington: U. S. Government Printing Office, 1958), pp. 397-8.

124. See cases cited in Marvin J. Sonosky, "State Jurisdiction over Indians in Indian Country," North Dakota Law Review 48(1972): 551, n.5.

125. Sonosky, Ibid., pp. 552-3.

126. 62 Stat. 757, as amended 18 U. S. C.1151.

127. John F. Sullivan, "State Power Over Reservation Indians," Montana Law Review 33(1972): 291, 292. In 1962, the U. S. Supreme Court stated in dictum that the Alaska Ordinance language did not preclude all state jurisdiction over Indian property. (Kake v. Egan 369 U. S. 60, 67-71) That case, however, involved non-reservation Indians using fish traps outside a reservation. The Court held that the Ordinance disclaimer applied only to proprietary, not governmental functions. Following this decision, a less restrictive view of the Montana Ordinance may be possible; more likely, however, with the provision of the Indian Civil Rights Act, the Ordinance will be interpreted in the future as leaving no jurisdiction to states except non-Indians and non-Indian affairs within reservation boundaries.

128. U. S. v. Partello, 48 F. 670, 676.

129. Ibidem.

130. State ex. rel. Irvine v. District Court, 239 p. 2d. 272, 276.

131. State ex. rel. McDonald v. District Court, 496 P. 2d 78.

132. Transcript of Proceedings, Montana Constitutional Convention, Helena, Montana, Vol. X, p. 7836.

133. Convention Transcripts, Vol X, p. 7837.

134. Convention Transcripts, Vol XI, pp. 8873, 8905-7.

135. Permission to do so was granted by Congress. See 25 U. S. C. 1324.

136. 67 Stat. 58.

137. Agua Caliente Band of Mission Indians, Tribal Council v. City of Palm Springs, 347 F. Supp. 42.

138. Ibid., p. 590, Section 7.

139. 83-801 et. seg., R. C. M. 1947.

140. State ex. rel. McDonald v. District Court, 496 p. 2d. 78.

141. 25 U. S. C. 1321.

142. 25 U. S. C. 1322.

143. 25 U. S. C. 1326.

144. 487 P. 2d. 1136.

145. Security State Bank v. Pierre, 511 P. 2d. 325, 329-30.

146. State ex. rel. Iron Bear v. District Court, 512 P. 2d. 1292, 1297.

147. Ibid. at 1298-99.

148. Patrick E. Hacker, et. al., "State Jurisdiction Over Indian Land Use," Land and Water Law Review IX (1974): 421. 449.

148a. Bad Horse v. Bad Horse, 31 St. Rep. 22 (No. 12519).

149. 25 U. S. C. 1322(b).

150. 358 U. S. 217.

151. Ibid., at 220.

152. 93 S. Ct. 1257.

153. The Secretary of the Interior in 1965 adopted 25 C. F. R. 1.4. Perhaps this was a move on the part of the Secretary to slow the rush to assume state jurisdiction over Indian lands:

"a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions,

rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate."

Using this regulation in an attempt to acquire jurisdiction is improbable.

154. People v. Joudreau, 166 N.W. 2d 293.

155. William R. Baldassin and John T. McDermoth, "Jurisdiction Over Non-Indians," American Indian Law Review I(1973): 13; and Michael P. Goldstein, "Tribal Jurisdiction Over Non-Indians on Indian Reservations," unpublished manuscript, EQC files, June 19, 1973. See also, Gregory J. Christoffel, "Indian Tribal Courts," St. Louis University Law Journal 18 (1974): 461.

156. "Blackfeet proposals jolt Conrad meeting," Great Falls Tribune, August 14, 1974

157. See Sonosky, op. cit., passin.

158. Sonosky, op.cit., cases cited at 558, n. 58.

159. In 1929, the states were allowed, subject to the Secretary of the Interior, to inspect health, educational, and sanitary conditions on the reservations, and to enforce compulsory education laws. Such inspection was conditioned upon consent by the tribe. 25 U. S. C. 231.

160. See U. S. Constitution, Article I, Section 8.

161. See 42 U. S. C. 4231(b).

162. Grad, op. cit. p 852, n. 171 and p. 854.

163. Daniel Elazar, "The New Federalism: Can the States Be Trusted?" The Public Interest, No. 35 (Sp, 1974): 102.